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IN THE

Supreme Court of the United States

October Term, 1959

No. 51

ERNEST J. HOUSE, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR RESPONDENT

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IN THE

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OCTOBER TERM, 1965

No. 51

EDDIE J. HICKS, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals (R. 12-15) is reported at 197 A. 2d 154. The United States Court of Appeals for the District of Columbia Circuit [1] rendered no opinion, but its orders (1)

[1] The United States Court of Appeals for the District of Columbia Circuit will be referred to hereafter as the Court of Appeals.

"Denying Allowance of Appeal," (2) "Denying Petition for Reconsideration En Banc" of denial of petition for allowance of appeal and (3) "Vacating and Reentering Order Denying Petition for Reconsideration En Banc" appear in the transcript of record at pages 17, 28-29 and 33-34, respectively.

JURISDICTION

The order of the division of the Court of Appeals denying an appeal from the judgment of the District of Columbia Court of Appeals was entered April 28, 1964 (R. 17). The order of the Court of Appeals "Denying Petition for Reconsideration En Banc" was entered June 15, 1964 (R. 28-29). The order of the Court of Appeals "Vacating and Reentering Order Denying Petition for Reconsideration En Banc" was entered October 26, 1964 (R. 33-34). The petition for writ of certiorari was filed November 25, 1964, and was granted February 1, 1965. Petitioner has invoked the jurisdiction of the Court under 28 U. S. C. § 1651 (a) (1958) [2] and urges that, on the authority of *Heflin* v. *United States*, 358 U. S. 415 (1959), the petition for writ of certiorari was timely for purposes of Supreme Court Rule 22 (2). Because, in the view of respondent, the petition for writ of certiorari was not filed within the time prescribed by Supreme Court Rule 22 (2), the Court is without jurisdiction either under 28 U. S. C. § 1651 (a) (1958) or under 28 U. S. C. § 1254 (1) (1958).

STATUTES INVOLVED

United States Code, Title 28, Chapter 81,
Section 1254 (1958). *Courts of Appeals; Certiorari****.

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[2] It does not appear from the transcript of record that petitioner either sought or was granted, pursuant to Supreme Court Rule 31 (1), (2), and (4), leave to file a petition for the issuance by the Court of the common law writ of certiorari authorized by 28 U. S. C. § 1651 (a) (1958).

Act of December 23, 1963, P. L. 88-241, Section 1, 77 Stat. 479, 612, 613; D. C. Code §§ 11-321, 17-101, 17-104 (Supp. IV, 1965).

RULES OF COURT INVOLVED

Rules of the Supreme Court of the United States,
Rule 22 (2). *Review on Certiorari—Time for Petitioning.*
Rule 31 (1) and (2). *Procedure on Applications for Extraordinary Writs.*

Rules of the United States Court of Appeals for the District of Columbia Circuit Governing Review of Cases from the District of Columbia Court of Appeals,
Rule 1. *Character of Cases which May be Considered.*
Rule 9. *Entry of Orders Allowing or Denying Appeal.*
Rule 10. *Reconsideration.*

The text of the pertinent provisions of the statutes and rules of court involved are set forth in the appendix hereto.

QUESTIONS PRESENTED

The Court of Appeals, on June 15, 1964, entered an order denying reconsideration en banc of its denial of an appeal from the judgment of the District of Columbia Court of Appeals in a vagrancy case. On motion of petitioner filed more than 75 days thereafter, the Court of Appeals, on October 26, 1964, entered an order vacating and reentering, as of that date, such order of June 15, 1964. The questions presented are:

1. Did the Court of Appeals, by the simple expedient of vacating its order entered June 15, 1964, and reentering such order as of October 26, 1964, enlarge the time prescribed by Supreme Court Rule 22 (2) within which to petition the Court for writ of certiorari?

2. Assuming the jurisdiction of the Court, is there a judgment or decree of the Court of Appeals, respecting the constitutionality of the District of Columbia Vagrancy Act, reviewable by this Court on writ of certiorari?

3. Absent any showing of the facts and circumstances surrounding petitioner's arrest and conviction for vagrancy, is there any basis for a determination that, as applied to petitioner, the District of Columbia Vagrancy Act is vague and indefinite and, therefore, void under the due process clause of the Fifth Amendment?

4. Is the District of Columbia Vagrancy Act so vague and so indefinite that it is unconstitutional on its face?

STATEMENT OF THE CASE

Petitioner was found guilty in the District of Columbia Court of General Sessions on an information charging him with being a vagrant in violation of D. C. Code § 22-3302 (1961), which defines a vagrant as: "* * * (3) Any person leading an immoral or profligate life who has no lawful employment and who has no lawful means of support realized from a lawful occupation or source" (R. 3-4). As permitted by D. C. Code § 22-3304 (1961), imposition of sentence was suspended (R. 4).

On various alleged constitutional grounds, petitioner moved for arrest of judgment and moved also for a new trial (R. 5-7). The motions were denied (R. 8), and petitioner appealed to the District of Columbia Court of Appeals (R. 9), which affirmed the judgment of conviction (R. 12-15). Following the denial of a motion for rehearing (R. 15), petitioner petitioned the Court of Appeals for allowance of an appeal from the judgment of the District of Columbia Court of Appeals (R. 16).

On April 28, 1964, a division of the Court of Appeals entered an order denying allowance of an appeal (R. 17). Within the time permitted by Rule 10 of the Rules Governing Review of Cases from the District of Columbia Court of Appeals (App., *infra,* p. 4), petitioner, with

the supporting affidavit of his counsel, petitioned the Court of Appeals for reconsideration en banc of the denial of an appeal. In both the petition and in the affidavit, it was urged, among other things, that a copy of the District's [3] brief in opposition to the petition for allowance of an appeal "* * * was never received by either Petitioner or Amicus or their attorneys * * *" (R. 18-26). On June 15, 1964, the Court of Appeals en banc entered an "Order Denying Petition for Reconsideration En Banc" (R. 28-29).

On September 1, 1965, more than 75 days after the entry of the order denying rehearing en banc, petitioner lodged with the Court of Appeals a motion entitled "Motion of Petitioner to Vacate and Reenter Order" which, on October 26, 1964, was permitted to be filed. It was represented in the motion that, due to excusable neglect occasioned by counsel's unfamiliarity with the Rules of the Supreme Court governing review on writs of certiorari "* * * in criminal cases arising from United States Courts of Appeals, * * *" the "* * * attorney for petitioner-movant failed to prepare and file a petition for certiorari within the special 30-day limitation period provided, in Rule 22 (2) of the Supreme Court's Rules * * *" (R. 31). It was then urged in behalf of petitioner that:

> "In order therefore, to cure the procedural mistake which presently precludes review by the Supreme Court under its Rule 22 (2), it is respectfully requested that this Court vacate its order of June 15, 1964, and reenter that order contemporaneously with the granting of this motion" (R. 31).

The Court of Appeals, on October 26, 1964, entered an "Order Vacating and Reentering Order Denying Petition For Reconsideration En Banc" (R. 33-34), and, within 30 days thereafter, petitioner filed in this Court a petition

[3] Respondent will be referred to herein as the District.

for writ of certiorari which, on February 1, 1965, was granted.

SUMMARY OF THE ARGUMENT

Whether granted pursuant to 28 U. S. C. § 1254 (1) (1958) or 28 U. S. C. § 1651 (1958), the Court is without jurisdiction because the petition for a writ of certiorari was not filed within the time prescribed by Supreme Court Rule 22 (2). From this it follows that the writ of certiorari was improvidently granted and should, for that reason, be dismissed;[4] and this is true even if this is a case in the Court of Appeals for purposes of 28 U. S. C. § 1254 (1) (1958).

Since the Congress has established the conditions of appellate review of cases originating in the District of Columbia Court of General Sessions, absent any showing of the special and unusual circumstances which warrant the exercise of the Court's discretionary power to issue the common law writ of certiorari, 28 U. S. C. § 1651 (1958) is clearly without application.

But more than this, there has been no judgment of the Court of Appeals on any issue respecting the constitutionality of the District of Columbia Vagrancy Act. Consequently, no judgment has been brought here by the record in this case which the Court may properly review on writ of certiorari.[5]

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[4] As the Court said in *Forsyth* v. *Hammond*, 166 U.S. 506, 511 (1897):

> "* * * This contention involves two matters: First, the question of power, and second, that of propriety. It may be that the question of propriety should be considered as foreclosed by the action of the court in awarding the writ of certiorari, but the question of power, being one of jurisdiction, is always open, and must whenever presented be considered and determined."

[5] The District of Columbia Court of Appeals, although created by Act of Congress, is not a court "of the United States" within the Federal Judicial System, as defined by 28 U. S. C. A. § 451 (Supp. 1964), nor is it the highest court of a state in which decision could be had for purposes of 28 U. S. C. § 1257 (1958), and the Congress has not provided for a review of its judgments or decrees by the Supreme Court. Cf. Supreme Court Rule 62, which declares that, for purposes of Supreme Court Rules, the term "state court" includes the Supreme Court of Puerto Rico.

In any event, the District of Columbia Vagrancy Act is not unconstitutional because of vagueness or uncertainty either as applied to petitioner or on its face. Rather, the statute is reasonably definite, clear and precise, and it proscribes conduct in words so well understood that no man of common intelligence is required to speculate as to their meaning.

ARGUMENT

I.

Because the petition was not filed within the time prescribed, the Court is without jurisdiction, and the writ of certiorari should be dismissed.

Presented at the outset is the question of the jurisdiction of the Court to review this case on writ of certiorari. As nearly as can be determined, the writ has been granted to review the action of the Court of Appeals in denying discretionary review of a judgment of the District of Columbia Court of Appeals. It is apparently conceded that such action of the Court of Appeals was in exercise of jurisdiction conferred by Pub. L. 88-241, § 1, 77 Stat. 479, 613, D. C. Code §§ 11-321, 17-104 (Supp. IV, 1965) (App., *infra*, p. 1).

Petitioner apparently also concedes, as he must, that, on the authority of *Ferguson* v. *District of Columbia*, 270 U. S. 633 (1926), this is not a case "in the Court of Appeals" for purposes of review on writ of certiorari under 28 U. S. C. § 1254 (1) (1958) (Petitioner's brief, p. 2). And, as the District will hereafter demonstrate, this case is not reviewable on writ of certiorari under any section of the Judicial Code.

Assuming, however, *arguendo*, that an order of the Court of Appeals denying discretionary review of a judgment of the District of Columbia Court of Appeals is reviewable by this Court on writ of certiorari, the District

respectfully submits that the Court is wholly without jurisdiction to review the order here involved.

A. The petition for writ of certiorari was not, for purposes of 28 U. S. C. § 1254 (1) (1958), timely filed.

Upon the face of the record, it is almost too clear for discussion that, for purposes of 28 U. S. C. § 1254 (1) (1958), the petition for writ of certiorari was not filed within the time prescribed by Supreme Court Rule 22 (2).

The order denying reconsideration en banc of the denial of the petition for allowance of an appeal was entered June 15, 1964 (R. 28, 29). The motion "• • • To Vacate and Reenter, • • •" filed more than 75 days thereafter, complained of no ambiguity in the order denying reconsideration en banc, asked for no reconsideration of such order, and sought no change in any matter of substance involved therein (R. 30, 32). Significantly enough, the order of the Court of Appeals granting the motion "• • • To Vacate and Reenter • • •" neither disturbed nor revised, in any manner of substance, the legal rights and obligations which, by the order of June 15, 1964, were settled with finality.

What stands uncontroverted in the record is that the sole purpose of the motion "• • • To Vacate and Reenter • • •" and the order of the Court of Appeals granting such motion was to rejuvenate an extinguished right to petition this Court for a writ of certiorari. Cf. *Allegrucci* v. *United States*, 372 U. S. 954 (1963). In the motion to vacate and reenter, it was said in this connection:

> "In order therefore, to cure the procedural mistake which presently precludes review by the Supreme Court under its Rule 22 (2), it is respectfully requested that this Court vacate its order of June 15, 1964, and reenter that order

contemporaneously with the granting of this motion" (R. 31).

It is now well settled by decisions of this Court that the time within which to petition the Court for a writ of certiorari cannot be enlarged by the simple expedient of entering in the court below an order granting a motion, filed many days beyond the time prescribed by Supreme Court Rule 22 (2), urging some action which has no effect on the merits of the decision or decree sought to be reviewed.

Thus, in *F. T. C.* v. *Minneapolis-Honeywell Co.*, 344 U. S. 206, 210-212 (1952), a writ of certiorari was dismissed upon a showing that application therefor was filed more than 90 days after the entry of the order sought to be reviewed. In that case, the Court of Appeals for the Seventh Circuit entered, on July 5, 1951, a judgment reversing Part III of a three-part cease and desist order of the Federal Trade Commission. The court, however, made no disposition of the Commission's cross-petition for the enforcement of all parts of such order. Long after the expiration of the 15-day period prescribed for filing petitions for rehearing, the Commission, by memorandum, represented to the court that no disposition had been made of the cross-petition, and urged the court to "'• • • make and enter • • • a decree affirming Parts I and II of the Commission's order to cease and desist'" and commanding obedience thereto. On September 18, 1951, the court issued what it termed its final decree by which Part III of the Commission's order was again reversed. The court then affirmed Parts I and II and entered a judgment providing for the enforcement thereof.

Within 90 days thereafter, the Commission petitioned the Supreme Court for a writ of certiorari which was granted. In compliance with the Court's request that counsel discuss the timeliness of the application for the writ, it was urged that, when a court actually changes its

judgment, the time to petition begins to run anew and that the court in this case had changed its judgment. This Court did not agree, and, in dismissing the writ, no doubt as improvidently granted, said:

> "While it may be true that the Court of Appeals had the power to supersede the judgment of July 5 with a new one, it is also true, as that court itself has recognized, that the time within which a losing party must seek review cannot be enlarged just because the lower court in its discretion thinks it should be enlarged. Thus, the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." [Footnotes omitted.] *Id.* at 211-212.

To the same effect was *Dept. of Banking* v. *Pink*, 317 U. S. 264 (1942). There, after final judgment of the New York Court of Appeals, a remittitur was amended by adding to it a statement that a federal question was presented and necessarily passed upon. Within 90 days after the amendment of the remittitur, but more than 90 days after the entry of the final judgment, petition was made to the Supreme Court for a writ of certiorari. Rejecting the contention that the amendment of the remittitur had the effect of extending the time to apply for certiorari, the Court denied the petition, saying:

> "For the purpose of the finality which is prerequisite to a review in this Court, the test is not

> whether under local rules of practice the judgment is denominated final * * *, but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review * * * (see *Gorman* v. *Washington University,* 316 U. S. 98). Where the order or judgment is final in this sense, the time for applying to this Court runs from the date of the appellate court's order, since the object of the statute is to limit the applicant's time to three months from the date when the finality of the judgment for purposes of review is established." *Id.* at 268.

See also: *Allegrucci* v. *United States,* 372 U. S. 954 (1963); *United States* v. *Robinson,* 361 U. S. 220 (1960); *Matton Co.* v. *Murphy,* 319 U. S. 412 (1943); cf. *Wolfsohn* v. *Hankin,* 376 U. S. 203 (1964); *Harris Lines* v. *Cherry Meat Packers,* 371 U. S. 215 (1962); *Thompson* v. *I. N. S.,* 375 U. S. 384 (1964); *F. P. C.* v. *Idaho Power Co.,* 344 U. S. 17 (1952); *Market Street R. Co.* v. *Railroad Com. of Cal.,* 324 U. S. 548 (1945).

It is, of course, an undeniable fact that the order of the Court of Appeals in this case denying reconsideration en banc of the denial of an appeal from the judgment of the District of Columbia Court of Appeals was not challenged in any manner by the motion to vacate and reenter such order (R. 30-32). Under the circumstances, the order granting the motion to vacate and reenter could not have enlarged, and did not enlarge, the 30-day period prescribed by Supreme Court Rule 22 (2) (App., *infra,* p. 2). Cf. *Wayne Gas Co.* v. *Owens. Co.,* 300 U. S. 131 (1937); *Market Street R. Co.* v. *Railroad Com. of Cal.,* 324 U. S. 548 (1945).

What the Court said in *United States* v. *Robinson,* 361 U. S. 220, 229 (1960), applies with even greater force here:

"That powerful policy arguments may be made both for and against greater flexibility with respect to the time for the taking of an appeal is indeed evident. But that policy question, involving as it does, many weighty and conflicting considerations, must be resolved through the rule making process and not by judicial decision. * * *"

B. The common law writ of certiorari is not available to petitioner in this case.

Although petitioner did not make in his petition, and has not made in his brief on the merits, the showing required by Supreme Court Rule 31 (App., *infra*, p. 2) as a condition precedent to the issuance of the common law writ of certiorari, he contends, nevertheless, that the Court has jurisdiction under 28 U. S. C. § 1651 (1958), to review the action of the Court of Appeals complained of. This contention is supported by no argument other than a statement in petitioner's "Statement of Jurisdiction" that "* * * the trial court had no authority to enter the judgment of conviction nor did the Court of Appeals have discretion to deny petitioner's petition for allowance of an appeal where the statute's unconstitutionality was the only grounds urged for reversal * * *" (Petitioner's brief, p. 2).

By this statement, petitioner again apparently concedes, as he should, that, in denying the allowance of an appeal, the Court of Appeals exercised the jurisdiction conferred upon it by § 1 of Pub. L. 88-241, 77 Stat. 479, 613, D. C. Code §§ 11-321, 17-104 (Supp. IV, 1965) (App., *infra*. p. 1). Following an affirmance of the judgment of conviction by the District of Columbia Court of Appeals, first a division of the Court of Appeals and then the Court en banc determined that there had not been a sufficient showing of any of the reasons set forth in Rule 1 of its Rules Governing Review of Cases from the District

of Columbia Court of Appeals (App., *infra*, p. 3) to warrant an exercise of the sound judicial discretion which the rule contemplates.

Petitioner has no constitutional right to a review by the Supreme Court of such action of the Court of Appeals. And, certainly, he has no constitutional right to a review by the Supreme Court of the judgment of the District of Columbia Court of Appeals. See *Griffin* v. *Illinois*, 351 U. S. 12, 18 (1956); *Cobbledick* v. *United States*, 309 U. S. 323, 325 (1940); *McKane* v. *Durston*, 153 U. S. 684, 687 (1894). In this connection, the Court said in *United States* v. *Sanges*, 144 U. S. 310, 319 (1892):

> "The appellate jurisdiction of this court rests wholly on the acts of Congress. For a long time after the adoption of the Constitution, Congress made no provision for bringing any criminal case from a Circuit Court of the United States to this court by writ of error. At February term, 1803, indeed, this court, no objection being made, took jurisdiction of a writ of error sued out by the United States to the Circuit Court for the District of Columbia in a criminal case. *United States* v. *Simms, 1 Cranch,* 252. But at February term, 1805, in a like case, this court, upon full argument and consideration, held that it had no jurisdiction of a writ of error in a criminal case, and overruled *United States* v. *Simms,* Chief Justice Marshall saying: 'No question was made in that case as to the jurisdiction. It passed *sub silentio*, and the court does not consider itself as bound by that case.' *United States* v. *More,* 3 Cranch, 159, 172. And it was thenceforth held to be settled that criminal cases could not be brought from a Circuit Court of the United States to this court by writ of error, but only by certificate of division of opinion upon specific questions of law. * * *"

Such right as petitioner had to any review of the judgment of conviction entered by the District of Columbia

Court of General Sessions is controlled by Pub. L. 88-241, § 1, 77 Stat. 479, 613, D. C. Code §§ 11-321, 17-104 (Supp. IV, 1965) and provided, of course, the case ever gets into the Court of Appeals, by 28 U. S. C. § 1254 (1) (1958). Consequently, the Congress, having established the conditions of appellate review of cases originating in the District of Columbia Court of General Sessions,[6] absent any showing of the special and unusual circumstances contemplated by 28 U. S. C. § 1651 (1958), the common law writ of certiorari is clearly not available to review the action of the Court of Appeals. See in this connection *Ex parte Farrell,* 189 F. 2d 540 (1st Cir., 1951), *cert. den.,* 342 U. S. 839 (1951), where such a writ was sought to review the action of a District Court in refusing to grant a certificate of probable cause for an appeal in a habeas corpus case. Because more than 30 days had elapsed since rendition of the District Court's order, the Court of Appeals for the First Circuit held that it could grant neither the certificate nor the writ, saying:

> "* * * Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its authority to issue a writ under the 'all writs' section, 28 U. S. C. § 1651, the only effect of which would be to avoid those conditions and thwart the congressional policy. * * * For us to grab hold of the present case under 28 U. S. C. § 1651 would not be in aid of our appellate jurisdiction elsewhere granted by law, but would be a palpable evasion of the

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[6] By the Act of December 23, 1963, Pub. Law, 88-241, § 1, 77 Stat. 485, D. C. Code § 11-741 (Supp. IV, 1965), Congress has provided that:

"(a) The District of Columbia Court of Appeals has jurisdiction of appeals from:

"(1) final orders and judgments of the District of Columbia Court of General Sessions * * *;

* * * * * * * * *

"(b) Except as provided by subsection (c) of this section, a party aggrieved by an order or judgment specified by subsection (a) of this section may appeal therefrom as of right to the District of Columbia Court of Appeals.

* * * * * * * * *

> statutory conditions which Congress has seen fit to impose upon our exercise of appellate jurisdiction in this class of cases." *Id.* at 545.

See also and compare *Wolfe* v. *North Carolina,* 364 U. S. 177, 195 (1960).

The traditional use of this extraordinary writ, both at common law and in the federal courts under 28 U. S. C. § 1651 (1958), has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel such a court to exercise the jurisdiction conferred upon it when it is its duty to do so.

Thus, in *House* v. *Mayo,* 324 U. S. 42 (1945), upon which petitioner so confidently, but mistakenly, relies, the Court, on motion for leave to file a petition for a writ of certiorari,[7] issued the writ in aid of the Court's appellate jurisdiction. There, a habeas corpus petitioner, having been denied by a United States district court the certificate of probable cause which would have allowed him to appeal in forma pauperis, sought such a certificate from the Fifth Circuit Court of Appeals. That court, however, would not even " * * * consider whether the case was one requiring it or a circuit judge to make the certificate of probable cause."

In *De Beers Mines* v. *United States,* 325 U. S. 212, 217 (1945), the writ issued to review the action of the district court in refusing to dissolve a preliminary injunction " * * * respecting a matter lying wholly outside the issues in the case," and the Court, citing with approval, *U. S. Alkali Exp. Asso.* v. *United States,* 325 U. S. 196 (1945), at 217-218, said that, since " * * * the preliminary injunction here granted * * * is one respecting a matter lying wholly outside the issues in the case; no decision of the suit on the merits can redress any injury done by the order * * *" unless reviewed under 28 U. S. C. § 1651 (1958). The Court then pointed out that the writ has

[7] Supreme Court Rule 31 (2) requires leave of Court to file petition seeking issuance of common law writ of certiorari.

never been available to correct a mere error in the exercise of conceded judicial power and that only " * * * when a court has no judicial power to do what it purports to do —when its action is not mere error but usurpation of power * * *" should the writ be available. *Ibid.*

Here, as urged above, petitioner has failed utterly to make the showing required as a condition precedent to any review under the common law writ of certiorari. And his failure to do so is understandable because, from this record, no such showing could be made.

The all writs section, 28 U. S. C. § 1651 (1958) did not enlarge or expand the jurisdiction of courts in the federal system; rather, it merely conferred auxiliary powers to be exercised in cases where jurisdiction is otherwise granted and already lodged in the courts. *Bankers Life & Cas. Co.* v. *Holland,* 346 U. S. 379 (1953); *Ex parte Fahey,* 332 U. S. 259 (1947); *Roche* v. *Evaporated Milk Assn.,* 319 U. S. 21 (1943); *United States* v. *First Federal Savings & Loan Ass'n.,* 248 F. 2d 804 (7th Cir., 1957), *cert. den.,* 355 U. S. 957 (1958).

In this case, the Court of Appeals, in denying discretionary review of the judgment of the District of Columbia Court of Appeals, acted within its conceded jurisdiction. By every standard of measurement, the time limits prescribed by Supreme Court Rule 22 (2) had long expired before the filing of the petition. It is, therefore, too clear for further discussion that there is no appellate jurisdiction of the Court to be aided by the common law writ of certiorari.

II

The Court of Appeals did not abuse its discretion when it denied an appeal from the judgment of the District of Columbia Court of Appeals.

Assuming, *arguendo,* the jurisdiction of the Court to review, under any theory, the action of the Court of Appeals in denying discretionary review of the judgment

of the District of Columbia Court of Appeals, it is clear from a casual examination of the record that the Court of Appeals committed no error when it refused to allow an appeal.

One of the reasons for such disposition of the case by the Court of Appeals was, no doubt, that, as stated by Judge McGowan, the constitutional questions were "* * * urged * * * on the basis of a record which is wholly unrevealing in factual terms," respecting the acts and conduct upon which the judgment of conviction was based (R. 28-29, 34). Yet, in the absence of any record as to such acts and conduct, this Court is asked to consider in isolation the constitutionality of the District of Columbia vagrancy law and to then declare it to be too vague and indefinite to satisfy constitutional requirements. But it is well settled that courts will not consider a constitutional question in a vacuum. *Federation of Labor* v. *McAdory,* 325 U. S. 450, 461 (1945).

Moreover, by virtue of the Court of Appeals' disposition of the case, this Court is without the benefit of a judgment of the highest court in this jurisdiction on the constitutional question presented. This Court, therefore, should not reach the constitutional question. See: *District of Columbia* v. *Little,* 339 U. S. 1 (1950); *District of Columbia* v. *Pace,* 320 U. S. 698 (1944); *Griffin* v. *United States,* 336 U. S. 704, 717 (1949); *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 570 (1947). Cf. *District of Columbia* v. *Thompson Co.,* 346 U. S. 100 (1953).

With respect to the District of Columbia vagrancy statute, petitioner has, however, conjured up hypothetical situations in which the statute *might* be applied by District authorities in violation of First Amendment rights, such as freedom of speech, assembly and religion.

He suggests, for example, that under the District statute the following conduct would constitute proof of leading an "immoral or proffigate life" and would sustain

a vagrancy conviction, i.e., where "* * * a member of the American Nazi Party * * * is peaceably giving a speech on the beliefs of that organization * * *" or members "* * * of an extreme racist group * * * [meet] to discuss peaceful ways to further their cause * * *"[8] (Petitioner's brief, p. 48).

But this Court has consistently refused to consider in the abstract the constitutionality of a criminal statute of this nature. See *Federation of Labor* v. *McAdory*, 325 U. S. 450, 461 (1945). In *United States* v. *Raines*, 362 U. S. 17, 22 (1960), the Court said:

> "* * * The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases * * *. [A] limiting construction could be given to the statute by the court responsible for its construction if an application of doubtful constitutionality were * * * presented. We might add that application of this rule frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy."

In urging the Court to declare unconstitutional on its face a part of the District of Columbia vagrancy statute, without any reference to the factual setting of his arrest and conviction, petitioner simply ignores the Court's command that such an attack upon a statute must "* * * of necessity be examined in the light of the conduct with

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[8] A vagrancy conviction rests on more than a mere finding that the defendant is leading an immoral or profligate life. There must be an additional finding that he has no lawful employment and no lawful means of support realized from a lawful occupation or source. D. C. Code § 22-3302 (3) (1961).

The hypothetical situations which petitioner sets forth suggest more the *possibility* of abuse under the "disorderly conduct" statute than under the vagrancy statute. See, for instance, *Rockwell* v. *District of Columbia*, D. C. Mun. App., 172 A. 2d 549 (1961); *Allen* v. *District of Columbia*, D. C. App., 187 A. 2d 888 (1963).

which a defendant is charged."[9] *United States* v. *National Dairy Corp.*, 372 U. S. 29, 33 (1963).

In *Lion Manufacturing Corporation* v. *Kennedy*, 117 U. S. App. D. C. 367, 330 F. 2d 833 (1964), the Court of Appeals recently reiterated this point of view, saying:

> "* * * The Supreme Court has but lately indicated that constitutional attacks upon criminal statutes for vagueness are most usefully weighed *in the context of a claim that certain specific conduct is proscribed. United States* v. *National Dairy Corp.*, 372 U. S. 29, 83 S. Ct. 594, 9 L. Ed. 2d 561 (1963). To assert that an act of Congress is unconstitutional on its face is a formidable contention under any circumstances; *the least that can be required of one who makes it is that he relate himself clearly to the impingement of the statute.* * * *" [Emphasis supplied; footnotes omitted.] *Id.* at 373, 374.

Much to the same effect was *Ellis* v. *Dickson*, 349 U. S. 458, 464 (1955). There, the Court granted certiorari to consider petitioner's claim that certain federal constitutional rights had been denied and that the New York Court of Appeals, by denying an appeal, had thwarted a review of the constitutional claims. Because the record was inadequate as a basis for a decision on the constitutional issues presented, the Court dismissed the writ as improvidently granted, saying:

> "* * * Even if we were to look at the matter ourselves de novo, we could not on this vague

[9] Of course, this is not to deny that this Court has, in a proper case, conferred standing on one who makes an attack against a statute for vagueness on its face, but this has been permitted most often in cases which have involved restrictions on First Amendment freedoms of speech and press. *N. A. A. C. P.* v. *Button*, 371 U. S. 415 (1963); *United States* v. *National Dairy Corp.*, 372 U. S. 29 (1963); *Stromberg* v. *California*, 283 U. S. 359 (1931); *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *Winters* v. *New York*, 333 U. S. 507 (1948). Cf. *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964). The Court has always construed limitations on First Amendment guarantees more strictly than in other areas. *N. A. A. C. P.* v. *Button*, *supra*, at 432; *United States* v. *National Dairy Corp.*, *supra*, at 36. Freedom of press, freedom of speech, and freedom of religion are in a preferred position. See *Busey* v. *District of Columbia*, 319 U. S. 579, 580 (1943), decided on authority of *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115 (1943).

> and empty record decide the constitutional issues sought to be presented. This Court has often refused to decide constitutional questions on an inadequate record. * * * In the circumstances of this case, we prefer to rest our decision on the ground that we lack jurisdiction. For if we could not ourselves decide on this record the constitutional issues tendered, we consider that by the same token the New York Court of Appeals was entirely justified in refusing to pass on them, and that we should therefore regard its denial of leave to appeal as resting on an adequate nonfederal ground. * * *" [Citations omitted.]

See also: *Rescue Army* v. *Municipal Court,* 331 U. S. 549 (1947).

Clearly, therefore, because the record does not establish an adequate basis for an attack upon the District of Columbia vagrancy statute as unconstitutional on its face, the writ of certiorari should be dismissed as improvidently granted. Cf. *Needelman* v. *United States,* 362 U. S. 600 (1960); *Bullock* v. *South Carolina,* 365 U. S. 292 (1961); *Baldonado* v. *California,* 366 U. S. 417 (1961).

III

The District of Columbia vagrancy statute is not unconstitutional as applied to petitioner.

The substance of petitioner's contention respecting the validity of the District of Columbia vagrancy statute is that subsection 3 thereof,[10] under which he was charged and convicted, "* * * is too vague and indefinite to provide sufficient guidance to citizens, the police or the courts." (Petitioner's brief, p. 10.) Significantly enough,

[10] D. C. Code § 22-3302 (1961), provides:

"The following classes of persons shall be deemed vagrants in the District of Columbia:

* * * * * * * *

"(3) Any person leading an immoral or profligate life who has no lawful employment and who has no lawful means of support realized from a lawful occupation or source."

however, there is not even pretense that the language of the statute, when measured by common understanding and practices, is so vague and indefinite that petitioner was not warned of the acts and conduct which it proscribes. In fact, from aught that appears in the record, the statute's application to the acts and conduct of petitioner which resulted in his conviction satisfied every requirement of due process.

Absent any factual foundation in the record showing to the contrary, it must, therefore, be presumed that, as applied to petitioner, the vagrancy statute is constitutional, since the statute comes to the attention of the Court with the strongest presumption of constitutionality of which it is susceptible. Under these circumstances, petitioner should "* * * not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. * * *" *United States* v. *Raines*, 362 U. S. 17, 21 (1960).

The reason for this is that courts will not pass upon the constitutionality of a statute abstractly or in the manner of an academic discussion. *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 479 (1938). As the Court said in *Massachusetts* v. *Mellon*, 262 U. S. 447, 488 (1923):

> "* * * We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. * * * The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. * * *"

As hereinabove stated, petitioner in this case is eloquent by his silence concerning any specific complaint of the statute's application to his acts and conduct. Without

making any attempt to show that the statute is so vague that he, himself, was unable to determine from its language what conduct was proscribed, he is content to attack its constitutionality by invoking the rights of others. This, petitioner should not be permitted to do. Cf. *Edelman* v. *California*, 344 U. S. 357 (1953).

The vagrancy statute thus brought into question is concerned with an area of law enforcement clearly within the scope of the police power of the Congress in the exercise of its exclusive legislative jurisdiction over the Nation's Capital. United States Constitution, Article 1, Section 8, Clause 17; *District of Columbia* v. *Thompson Co.*, 346 U. S. 100 (1953). Since the Constitution does not impose impossible standards, all that is required of such a statute is that its language convey "* * * sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. * * *" *United States* v. *Petrillo*, 332 U. S. 1, 8 (1947). As will be demonstrated below, this Court and other federal and state courts have found similar statutes to be constitutional against a claim of vagueness.

Thus, a federal statute prohibiting the transportation in interstate commerce of women for "any immoral purpose," withstood attack as to the claimed vagueness of the quoted words. *Caminetti* v. *United States*, 242 U. S. 470 (1917); *Cleveland* v. *United States*, 329 U. S. 14 (1946). In the Immigration and Naturalization Act, the phrase "crime involving moral turpitude" was held not to void the statute because of vagueness. *Jordan* v. *DeGeorge*, 341 U. S. 223 (1951). And the Court has held that a statute which makes it a criminal offense to exhibit in a public place a publication which "' * * * portrays depravity, criminality, unchastity, or *lack of virtue* of a class of citizens, of any race, color, creed or religion * * *' " [Emphasis supplied] is not void for vagueness. *Beauharnais* v. *Illinois*, 343 U. S. 250, 251 (1952).

In *Roth* v. *United States*, 354 U. S. 476 (1957), where the Court held that a statute which makes punishable the mailing of material that is "obscene, lewd, lascivious or filthy" was not ~~factually~~ vague, it said, at 491-492:

> "Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. ' . . . [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' *United States* v. *Petrillo*, 332 U. S. 1, 7-8. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '. . . boundaries sufficiently distinct for judges and juries fairly to administer the law. . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . .' *Id.* at 7. * * *" [Citations omitted; footnote omitted.]

Many state courts, in the face of attacks because of vagueness upon the validity of vagrancy statutes similar to that of the District of Columbia, have upheld such statutes. Compare such representative decisions as *State* v. *Harlowe*, 174 Wash. 227, 24 P. 2d 601 (1933) ("lewd, disorderly or dissolute person"); *Ex parte McCue*, 7 Cal. 765, 96 P. 110 (1908) ("idle, dissolute, lewd, or immoral life"). Cf. also *Hunnicutt* v. *State*, 71 Ga. App. 574, 31 S. E. 2d 424 (1944) ("immoral and profligate").

Other District of Columbia criminal statutes proscribe the commission of a "lewd, obscene, or indecent act," D. C. Code § 22-1112 (1961); taking of "immoral, improper, or indecent liberties" with children, D. C. Code

§ 22-3501 (1961); use of "any profane language or indecent or obscene words," D. C. Code § 22-1107 (1961); sale or exhibition of any "obscene, lewd, or indecent book" or "article of indecent or immoral use," D. C. Code § 22-2001 (1961); and inviting or enticing another to engage in acts of prostitution or acts for "any other immoral or lewd purpose," D. C. Code § 22-2701 (1961). Presumably, if petitioner's contentions are correct that the use in the vagrancy statute of the words "immoral or profligate" renders the statute constitutionally void for vagueness, the above-enumerated statutes must likewise be deemed void, because the words of proscription are obviously similar.

Petitioner suggests that the provision of the California statute punishing a *dissolute* person as a vagrant has now "been put to rest" by the enlightened, recent (1961) revision of the vagrancy statute in the California Penal Code (Petitioner's brief, pp. 42-44). He argues that "* * * if the term 'dissolute' is an inadequate standard, then 'immoral or profligate' certainly is * * *" (Petitioner's brief, p. 44).

While the revision of the California Penal Code did make certain amendments to the vagrancy law, it still punishes one "* * * who engages in lewd or dissolute conduct * * *." Cal. Stats. 1961, c. 560, § 2; CAL. PEN. CODE, § 647 (West. Ann. Supp. 1964). Thus, whatever California found objectionable in its previous vagrancy statute, it apparently did not regard the proscription of "lewd or dissolute conduct" as susceptible to constitutional attacks for vagueness.

Contrary to petitioner's claim, therefore, the words "immoral or profligate" in the District of Columbia vagrancy statute are not vague and indefinite; rather, these words are "* * * sufficiently definite to give notice of the required conduct to one who would avoid its penalties. * * *" *Boyce Motor Lines* v. *United States*, 342 U. S.

337, 340 (1952), and petitioner "* * * need not therefore have been a prophet to understand what the statute condemned. * * *" *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 574, n. 8 (1942).

CONCLUSION

From all of the foregoing, it is respectfully submitted (1) that the Court is without jurisdiction and, therefore, the writ of certiorari should be dismissed as improvidently granted; and (2) that, if the Court has jurisdiction, the order of the Court of Appeals denying discretionary review of the judgment of the District of Columbia Court of Appeals should be affirmed.

Respectfully submitted,

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